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NO. 82-779

In the Supreme Court of the United States

OCTOBER TERM, 1982

HARRY J. HOLMES,

Petitioner

vs.

J. RAY McDERMOTT & CO., INC.

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James A. Wysocki, Esq.
Bonnie L. Zakotnik, Esq.
Heisler & Wysocki
Counsel for Petitioner
1410 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 586-9971

A. Questions presented for review:

1) Whether an injured seaman's claim for attorney's fees, resulting from his Jones Act employer's wilful and arbitrary termination of maintenance and cure, precludes the judgment entered on the jury's award of general damages from being a final judgment where prior to trial all parties agreed to reserve the amount of any such fees to later determination by the District Judge; and

2) Whether, as a practical procedural matter, attorney's fees should be determined during the trial of liability and general damages issues where the attorney's fees do not change the judgment, but are merely due because of the judgment, and to require proof of them during the trial would permit pre-trial in-

vasions of an attorney's work-product and attorney-client confidences.

B. List of parties:

a) Harry J. Holmes; and

b) J. Ray McDermott & Co., Inc. (now legally known as McDermott, Inc.).

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Constance v. Johnston Drilling Company, 422 F.2d 369 (5th Cir. 1970);

Cortes v. Baltimore Insular Line, 287 U.S. 367, 371, 53 S.Ct. 173, 174, 77 L.Ed. 368;

De Long Corp v. Raymond International, Inc., 622 F.2d 1135 (3rd Cir. 1980);

Gaspard v. Taylor Diving & Salvage Co., Inc., 649 F.2d 372 (5th Cir. 1981);

Hidell v. International Diversified Interests, 520 F.2d 529, fn. 4 (7th Cir. 1975);

Holmes v. J. Ray McDermott & Co., Inc., 682 F.2d 1143 (5th Cir. 1982);

Incandela v. American Dredging Co., 659 F.2d 11 at 15 (2nd Cir. 1981);

The Iroquois, 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955;

Kraljic v. Berman Enterprises, Inc., 575 F.2d 412 (2nd Cir. 1978);

Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981);

Mackey v. National Steel Corp., 292 F. Supp. 222, 232 (N.D. Ohio 1967);

Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131 (6th Cir. 1980);

Obin v. District No. 9, etc., 651 F.2d 574 (8th Cir. 1981);

Pino v. Protection Maritime Ins. Co., Ltd., 490 F. Supp. 277 (D. Mass. 1980);

Preston v. United States, 284 F.2d 514 (9th Cir. 1960);

Richard v. Bauer Dredging Co., Inc., 433 F.2d 954 (5th Cir. 1970);

Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973);

Sams v. Haines, 299 F. Supp. 746 (S.D. Ga. 1969);

Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975);

Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962);

White v. New Hampshire Department of Employment Security, ____ U.S. ____, 102 S.Ct. 116 (1982) [50 U.S. Law Week 4255, March 2, 1982].

E. Jurisdiction of this Court:

1) The decision and judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 9, 1982;

2) No rehearing or extension of time was requested;

3) No cross-petition for writ of certiorari is believed to have been filed or contemplated; and

4) Jurisdiction is believed conferred by 28 U.S.C. Section 2101(c).

F. Constitutional provisions, treaties, statutes, etc.:

None.

G. Statement of the case :

On May 8, 1977, Harry Holmes was employed by McDermott as a rigger and was working aboard McDermott's Lay Barge No. 23 when his back was injured while he and several other crew members were

carrying a heavy steel cable. On August 24, 1977 suit was filed in the United States District Court for the Eastern District of Louisiana on behalf of Harry J. Holmes against J. Ray McDermott & Co., Inc. pursuant to the Jones Act and the General Maritime Law. In addition to his demand for general damages, Mr. Holmes also asserted a claim for maintenance and cure and for damages and attorney's fees for failure to pay same. McDermott answered the lawsuit with a general denial. This case proceeded to trial on June 1, 1981. On June 5, 1981 the jury found that the injury was caused by the negligence of McDermott and the unseaworthiness of the vessel, and also found that McDermott "wilfully and arbitrarily" terminated Mr. Holmes' maintenance and cure benefits, awarding an additional amount for damages

on this issue. Finally, the jury found that attorney's fees were due. On June 9, 1981, the District Court entered judgment based on the jury's verdict, reserving the setting of the amount of the attorney's fees for later determination by the District Judge, a procedure which had been agreed to by all counsel and the Court prior to the close of evidence. McDermott then filed post-trial motions for judgment notwithstanding the verdict, new trial and/or remittitur on June 19, 1981, but failed to serve them until June 22, 1982, which was not within the ten days prescribed by Rule 59 of the Federal Rules of Civil Procedure. Plaintiff then promptly filed a "Motion to Dismiss Defendant's Post-Trial Motions" on grounds of untimeliness. On July 22, 1981, the District Court heard argument as to the timeliness issue and ordered

briefs as to whether or not the judgment entered on June 9, 1981, was final. By Minute Entry dated August 7, 1981, the District Court, holding that the judgment was final, granted plaintiff's "Motion to Dismiss Defendant's Post-Trial Motions", and, in the alternative, denied all of the defendant's post-trial motions. On August 7, 1981, McDermott filed its notice of appeal. Oral argument was heard on May 26, 1982, and on August 9, 1982 the Fifth Circuit dismissed the appeal after finding that the judgment was not final. Taking issue with the Fifth Circuit's finding, Mr. Holmes petitions for a writ of certiorari.

H. Review of state court judgment:

None.

I. Federal court jurisdiction:

Suit was filed asserting a claim under the Jones Act, 46 U.S.C. Section 688, with federal jurisdiction founded on 28 U.S.C. Sections 1331, 1333 and/or 1337.

J. Argument on "finality":

If a seaman proves entitlement to maintenance and cure, and if the Jones Act employer is found to have withheld those benefits "wilfully and arbitrarily", then, and only then, is the seaman entitled to also recover attorney's fees as the prevailing party. There is thus absolutely no legal difference between the seaman's "judicially" created right to attorney's fees under the general maritime law and any citizen's "statutorily" created right to attorney's fees under the Civil Rights Act. Yet the Fifth Circuit has here attempted to create

a difference by factually distinguishing the clear holding of a recent U.S. Supreme Court decision. Compare Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L. Ed. 2d 88 (1962) with White v. New Hampshire Department of Employment Security, __ U.S. ____, 102 S.Ct. 1162 (1982) [50 U.S. Law Week 4255, March 2, 1982], and with the decision below, Holmes v. J. Ray McDermott & Co., Inc., 682 F.2d 1143 (5th Cir. 1982).

While Vaughan v. Atkinson does not discuss attorney's fees in connection with finality of a judgment on the merits, it does distinguish between "damages" and "necessary expenses", and includes attorney's fees as a "necessary expense", not as a part of the "claim for damages for the suffering and for the physical handicap which follows ..."

82 S.Ct. at 999. In fact, despite the development of maritime law over the centuries, we were unable to locate any U.S. Supreme Court case indicating procedurally whether the injured or ill seaman must prove the amount of attorney's fees before he prevails on the merits of the maintenance and cure claim. We find, instead, a groping by lower courts on how to procedurally resolve the seaman's attorney's fees dispute.

For instance, some of the approaches include:

1) jury decides "callousness" and the Court decides the amount. Incandela v. American Dredging Co., 659 F.2d 11 at 15 (2nd Cir. 1981);
2) jury or judge awards attorney's fees as part of punitive damages award. Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973);

Pine v. Protection Maritime Ins. Co., Ltd., 490 F. Supp. 277 (D. Mass. 1980);

3) award of attorney's fees is the only punitive damage award. Kraljic v. Berman Enterprises, Inc., 575 F.2d 412 (2nd Cir. 1978);

4) no jury award of fees because no proof. Blanchard v. Cheramie, 485 F.2d 328 (5th Cir. 1973);

5) no judge award of fees because of no proof. Sams v. Haines, 299 F. Supp. 746 (S.D. Ga. 1969);

6) jury tried Jones Act and unseaworthiness issues; judge tried "callousness", maintenance, cure and fee issues. Richard v. Bauer Dredging Co., Inc., 433 F.2d 954 (5th Cir. 1970);

7) all issues tried by the judge. Constance v. Johnston Drilling Company, 422 F.2d 369 (5th Cir. 1970);

8) jury award of $296,240.00 as compensatory damages for wilful refusal to provide maintenance and cure including an unspecified amount for attorney's fees, reinstated on appeal. Gaspard v. Taylor Diving & Salvage Co., Inc., 649 F.2d 372 (5th Cir. 1981);

9) attorney's fees awarded by judge as 40% of wages, maintenance and interest. Catrakis v. Nautilis Petroleum Carriers Corp., 427 F. Supp. 255, 260 (S.D. N.Y. 1977); and

10) claim for attorney's fees is merely derivative of the maintenance and cure claim. Mackey v. National Steel Corp., 292 F. Supp 222, 232 (N.D. Ohio 1967).

Several implicit conflicts deserve resolution, such as whether the judge or the jury decides all the issues, whether the jury decides the merits and

damages with the judge determining the fees, see Incandela, 659 F.2d at 15, notes 3 and 4, whether the fees are compensatory or punitive, and the proofs required. At the root of all this uncertainty and conflict lies the absence of a definitive ruling on the nature of the seaman's claim for attorney's fees. The resolution is in the White holding: a judgment exclusive of attorney's fees is final because the claim for attorney's fees "does not imply a change in the judgment, but merely what is due because of the judgment."

____ U.S. at____, 102 S.Ct. at 1166 [50 U.S. Law Week at 4257]. This principle should be applied to any claim for attorney's fees which are recoverable only after the party prevails on the merits, whether brought by a citizen for vindication of his civil rights or by a seaman for

recognition of his ancient maritime remedies. In both cases the fees are not recoverable until after the party prevails.

In this case below, the Fifth Circuit panel was faced with seemingly inconsistent prior decisions on the finality of judgments with pending attorney's fees awards, and therefore attempted to divine some principle from the maze by creating the integral-part-of-the-merits versus costs-or-collateral dichotomy without any Supreme Court support. Such a distinction, however, flies in the face of the White principle and the practicalities of the situation for at least two reasons: first, while the White case arose under 42 U.S.C. § 1983 one of the reasons supporting the ruling applies equally to the seaman's claim here:

> "Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits -- an inquiry that cannot even commence until one party has 'prevailed'." 102 S.Ct. at 1166;

Secondly, attorney's fees are distinguishable from the other elements of the seaman's maintenance and cure claim as pointed out in Vaughan v. Atkinson,

> "While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows (The Iroquois, 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955), the recovery may also include 'necessary expenses'. Cortes v. Baltimore Insular Line, 287 U.S. 367, 371, 53 S.Ct. 173, 174, 77 L.Ed. 368." 369 U.S. at 530, 82 S.Ct. at 999.

Emphasizing these differences, the Court in White also noted: "Nor can attorney's fees fairly be characterized as an element of 'relief' indistinguishable from other elements", 102 S.Ct. at 1166, a distinction not recognized by the Fifth

Circuit. In essence, the Court in Cortes, Vaughan and White noted the obvious: there is a substantial difference between damages and attorney's fees.

In addition to civil rights cases, appellate courts in other types of cases have also held that the finality of a judgment on the merits is not affected by a pending resolution of the amount of applicable attorney's fees:

1) breach of contract case -- attorney's fees are collateral and independent. Obin v. District No. 9, etc., 651 F.2d 574 (8th Cir. 1981);

2) securities litigation -- attorney's fees from class member's fund are treated separately. Boeing Company v. Van Gemert, 100 S.Ct. 745 (1980); and attorney's fees are merely

incidental -- Swanson v. American Consumer Industries, Inc., 517 F. 2d 555 (7th Cir. 1975) and Hidell v. International Diversified Interests, 520 F.2d 529, fn. 4 (7th Cir. 1975);

3) commercial guarantees -- judgment is final even though attorney's fee is undetermined. Memphis Sheraton Corp v. Kirkley, 614 F.2d 131 (6th Cir. 1980);

4) patent case -- order disposing of merits is final even though attorney's fees not calculated. DeLong Corp. v. Raymond International, Inc., 622 F.2d 1135 (3rd Cir. 1980);

5) claim to Indian lands -- attorney's fees are a collateral matter appealable before the merits are determined. Preston v. United States, 284 F.2d 514

(9th Cir. 1960);

6) voting rights case -- denial of fees appealable as collateral and incidental. Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981)

To reluctantly employ a hackneyed phrase, the Fifth Circuit in Holmes made a distinction without a difference. White should be applied to a seaman's maintenance and cure claim, not distinguished from it.

Argument on "practical procedure": Turning then to a consideration of some of the practical and procedural aspects of the Fifth Circuit's Holmes decision, it creates more problems than it solves. By holding that the attorney's fees issue is part of the substance of the seaman's maintenance and cure claim, the efforts of plaintiff's counsel, including his work-product, may become

subject to pre-trial discovery. And if outside counsel is retained to offer expert opinion on the value of plaintiff's attorney's services, all of the documents reviewed by the expert counsel may be subject to a subpoena duces tecum. Inherent in both of these examples is the risk that the attorney-client privilege may be breached. Denial of the right to discovery on this issue prior to trial would probably raise a cry of "prejudice" from opposing counsel. Perhaps most appalling is the thought that plaintiff's counsel himself would be required to testify himself concerning his efforts, in which case he would probably be precluded from trying the merits of the case at all. Again, these practical procedural problems disappear if the White holding is applied to a seaman's maintenance and cure claim since none of the work-product, discovery, expert testimony

or appearance of counsel would become necessary until after trial on the merits, and then, as we began this argument, only "if a seaman proves entitlement to maintenance and cure, and if the Jones Act employer is found to have withheld those benefits wilfully and arbitrarily".

K. Appendix:

Attached is a copy of Holmes v. J. Ray McDermott & Co., Inc., 682 F.2d 1143 (5th Cir. 1982).

Respectfully submitted,

HEISLER & WYSOCKI

Bonnie L. Zakotnik

James A. Wysocki, Esq.
Bonnie L. Zakotnik, Esq.
Heisler & Wysocki
Counsel for Petitioner
1410 First N. B. C. Building
New Orleans, Louisiana 70112
Telephone: (504) 586-9971

C E R T I F I C A T E

I hereby certify that a copy of the foregoing "Petition For Writ Of Certiorari" has been served by hand on Edward J. Koehl, Jr., Esq.

New Orleans, Louisiana,
November 5, 1982.

Bonnie L. Zakotnik

Bonnie L. Zakotnik, Esq.